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PP v. RENGADORAI PERUMAL & ORS

HIGH COURT MALAYA, MUAR
AWG ARMADAJAYA AWG MAHMUD JC
[CRIMINAL TRIAL NOS: 45B-05-06-2016 & 45B-06-06-2016]
24 MAY 2021

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EVIDENCE: *Impeachment – Credit of witness – Contradictions between police statement under s. 112 of Criminal Procedure Code and testimony at trial – Whether contradictions material – Whether testimony of witness tainted and unsafe to act upon – Whether evidence of witness credible – Whether application of impeachment ought to be allowed – Evidence Act 1950, ss. 145(1) & 155(c)*

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This was the Deputy Public Prosecutor's ('DPP') application under s. 155(c) read together with s. 145(1) of the Evidence Act 1950 to impeach the evidence of the prosecution witness, PW21. The DPP alleged that there were material contradictions in PW21's evidence, between his testimony in court and his earlier police statement made pursuant to s. 112 of the Criminal Procedure Code. Therefore, for the purpose of the impeachment, the DPP applied to cross-examine the said witness. The court, having found that there were material contradictions between the police statement and PW21's testimony, allowed the DPP to cross-examine PW21. In PW21's testimony, he stated that, *inter alia*: (i) the time he entered the 'port' was around 6pm, and he left at 6.15pm to 6.20pm; (ii) he did not know a person called 'Nandu'; (iii) he crossed paths with 'Aris' ('deceased') during his way back home from the 'port'; (iv) there was a quarrel between 'Jufri' and the deceased; (v) there was no weapon around during the quarrel; and (vi) at the 'port', the deceased was seated with Indian and Malay men. This contradicted with PW1's police statement, where he stated: (i) the duration of time PW21 was at the 'port' was more than an hour; (ii) he knew who 'Nandu' was; (iii) the reason he went to the 'port' was to pick up the deceased, on the instruction of 'Nandu'; (iv) PW21 met the deceased while loitering or hanging around at the 'port'; (v) the quarrel that took place was between the deceased and 'Nandu'; (vi) during the quarrel with the deceased, 'Nandu' was holding a parang; and (vii) at the port, the deceased was seated with 'Nandu', 'Suresh' and 'Ayang'. During the cross-examination, PW21 was given the chance to explain the contradictions. PW21's explanations were: (i) he could not actually remember the time he entered the 'port' but he confirmed it to be around 6pm to 7pm, before dusk; (ii) he did not know who 'Nandu' was, but he heard the name from the people who kept mentioning it at the 'port'; (iii) he saw the deceased coming into the vicinity of the 'port' but he did not hang around the latter. Instead, he merely saw the deceased and 'Jufri' coming into the 'port' soon after he left the place; (iv) regarding the quarrel involving the deceased, he saw 'Jufri' and one

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Indian man screaming and shouting at the deceased; (v) he was not sure who held the parang. He merely heard it was 'Nandu', but he did not know who 'Nandu' was; and (vi) there were too many people at the 'port', therefore, he could not identify who sat with the deceased. Hence, the issue to be decided was whether the contradictions as set out were material, thus, warranting the evidence of PW21 to be impeached.

Held (allowing application):

(1) PW21's testimony contained more than one occasion of serious discrepancies and material contradictions, either on the identity, conduct, and the presence of various names. Further, PW21 also stated that he mentioned these names because he heard the names from the people at the 'port'. This was against the rule of hearsay, in contravention of s. 60 of the Evidence Act 1950. As such, PW21's evidence was obviously tainted as it was rife with material contradictions, had no substance in evidence law and unsafe to be acted upon. PW21 was also found to have lied on more than one occasion. As a result, his evidence was totally unreliable. For these reasons, the prosecution had successfully impeached the credibility of PW21's evidence. His testimony therefore ought to be expunged from the records and should not be considered at all for the purpose of this trial. (paras 73-76)

Case(s) referred to:

Chean Siong Guat v. PP [1969] 1 LNS 23 HC ***(refd)***
Cheong Seok Leng v. PP [1988] 1 LNS 39 HC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Kehar Singh & Ors v. The State (Delhi Administration) [1989] 1 CLJ 318; [1989] 2 CLJ (Rep) 723 SC ***(refd)***
Koay Chooi v. Regina [1955] 1 LNS 41 HC ***(refd)***
Krishnan Marimuthu & Anor v. PP [1982] CLJ 186; [1982] CLJ (Rep) 152 FC ***(refd)***
Kurup v. PP [1933] 1 LNS 38 HC ***(refd)***
Matthew Lim v. Game Warden, Pahang [1959] 1 LNS 57 HC ***(refd)***
Mohamed Alias v. PP [1981] 1 LNS 200 HC ***(refd)***
Mohamed Kasdi v. PP [1968] 1 LNS 78 HC ***(refd)***
Muthusamy v. PP [1947] 1 LNS 71 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No. 2) [1976] 1 LNS 184 HC ***(refd)***
PP v. Dwi Supriyatno Mei & Ors [2013] 1 LNS 1188 HC ***(refd)***
PP v. Lai Kon Ching & Anor [1994] 4 CLJ 750 HC ***(refd)***
PP v. Munusamy [1980] 1 LNS 63 FC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
Sim Bok Huat Royston v. PP [2001] 2 SLR 348 ***(refd)***
Tan Yew Choy v. PP [2008] 1 LNS 923 CA ***(refd)***
Yusof Omar lwn. PP [2001] 3 CLJ 122 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 113
Evidence Act 1950, ss. 24, 60, 145(1), 154, 155(c), 159
Malaysian Anti-Corruption Commission Act 2009, s. 53(2)

For the appellant - Mustaqim Sukarno; DPP
For the 1st respondent - G K Sritharan; M/s G K Sritharan & Co
For the 2nd respondent - Safiah Abdul Aziz; M/s Safiah Aziz & Co
For the 3rd respondent - Ramesh Vasan & Mariammah Benathan; M/s Ramesh Vasan & Co

Reported by Syamim Ariffin

JUDGMENT

Awg Armadajaya Awg Mahmud JC:

Introduction

[1] This is an oral application by the learned Deputy Public Prosecutor to impeach the evidence of a prosecution witness PW21 who was said to have departed from the police statement he made pursuant to s. 112 Criminal Procedure Code. It was applied for by the learned Deputy in the middle of the evidence-in-chief of PW21.

[2] The application for this impeachment is made pursuant to ss. 145 and 155 Evidence Act 1950.

Background Facts

[3] PW21 knew the deceased (Aris bin Hakim) since eight years ago because they stay in the same village ie, Kampung Paya, Layang-Layang and on 13 September 2015 between 5pm to 6pm PW21 was at Kampung Jaya Sepakat, Layang-Layang. Then he went out of his house to purchase some drugs. The place or station to transact in drugs (which is colloquially known as "port") is in the parit area. At about 6pm, he arrived at the "port".

[4] He saw a lot of people at the "port". They are Malays, Chinese and Indians. A few minutes later, he saw the deceased came on a motorcycle with a friend Jufri.

[5] The deceased went to sit with a group of people and suddenly there was a commotion. That group was about 20 metres away from where PW21 was seated. PW21 soon left the place. During the commotion, he did not see any weapon. Some were holding parangs (local machetes) but nothing happened. He saw the deceased quarrelling. He could not identify the Indian man who was quarrelling with the deceased.

[6] At this stage, the learned Deputy applied to cross-examine PW21 because of material contradictions in his evidence in court and that of the statement he gave to the police pursuant to s. 112 Criminal Procedure Code.

[7] The material parts are found as follows:

(i) Page 2 as highlighted in coloured pen.

(ii) Page 3 at para 1, middle page and para 2.

(iii) Page 4, paras 2 and 4.

[8] I perused over the marked paragraphs of the various pages of PW21's statement taken by the police pursuant to s. 112 Criminal Procedure Code. I found there are material discrepancies with the oral testimony given on oath on the witness stand in court. I allowed the application to cross-examine PW21.

[9] PW21 admitted that he had his statement taken by an inspector in the Malay language.

[10] He understood the questions posed to him and answered them and there was no problem in communicating with the police inspector. PW21 admitted he signed on the statement and showed the court his signature on the statement at the bottom of every page and at the end of his statement on the last page. He admitted that statement as his, and upon the learned Deputy's application, this court marked it as P50.

[11] The learned Deputy then applied for impeachment proceedings to commence against PW21 and I allowed it. The court invited the learned Deputy to commence the proceedings:

(i) In his testimony on oath, PW21 told the court he entered the "port" about 6pm but left about 6.15pm to 6.20pm but at p. 4 of his s. 112-statement (P50) he told the inspector that he was there for over one hour.

The explanation PW21 offered was that he could not remember the time but it was between 6pm - 7pm but he only remember, that it was before dusk sets in.

(ii) In his oral testimony, he told the court that he does NOT know Nandu while at pp. 2, 3 and 4 of his police statement (P50), he knew who Nandu was.

His explanation was that he did not know who is Nandu but merely heard of his name because he is a "tokan" (drugs supplier/pusher).

(iii) At p. 2 of P50 he said that he and Jufri went to pick up Aris because Nandu told him to do so but he told the court in oral testimony that he did not know Nandu.

His explanation was that he did not know Nandu but he heard of his name because many people kept mentioning that name to him.

A (iv) PW21 told the court that only when he was on the way home from the "port" he crossed path with the deceased but in P51 he told the police he was loitering or hanging around ("melepak") at the "port" when he met the deceased.

B His explanation was, he saw the deceased coming into the vicinity of the "port" but he did not hang around the deceased. Instead, he merely saw the deceased and Jufri coming into the area ("port") and soon after he left the place.

(v) In his oral testimony, PW21 told the court that Jufri and the deceased
C quarrelled but in P50 at p. 4, he told the police inspector that Nandu shouted at the deceased many times. His explanation was that at the crowd where the deceased was, Jufri and one Indian man were screaming and shouting at the deceased.

(vi) In court he, testified that he saw no weapon around but in P50 he told
D the police that Nandu was holding a parang (local machete).

His explanation was that he was not sure who was holding the parang (local machete). He merely heard people saying that Nandu but he does not know who Nandu is.

E (vii) In court he testified that the deceased was seated with Indian men and Malays. In P50, he said the deceased was seated with Nandu, Suresh and Ayang.

His explanation was that because there were too many people, he could not identify with whom did the deceased sat with.

F (viii) PW21 was asked on why he named names. His reply was that he heard names mentioned.

(ix) PW21 was asked he was with people buying drugs. His reply was that he could not ascertain or identify people buying drugs.

G **The Law On Impeachment Of The Evidence Of A Witness**

[12] "To impeach" means "to call into question the integrity or validity of (a practice)." It also means "to cast doubt" especially on evidence.

[13] In judicial proceedings "impeachment of the evidence of a witness" is
H a negative proceeding, it aims to prevent an evidence to be used against the adverse party. It does not seek to buttress any evidence in support of the case of a particular party, nor does it slice up the evidence of the opposite party.

[14] What it does is, it makes evidence given by a witness as being unworthy of consideration. It may also go to the full length that the said
I witness lied under oath and is liable for perjury prosecution.

[15] It is also an invitation to the court to be vigilant to the evidence of this witness under scrutiny. Even if the attempt to impeach failed, it is also a red flag to the court that this witness's evidence must be fine-combed and less weight be given. The court is entitled to accept part of the evidence and rejected the remainder.

[16] Impeachment generally means to call into question the veracity of a witness by means of evidence adduced for such purpose or the adducing of proof that a witness is unworthy of belief.

[17] Impeachment proceedings is for the purpose of rejecting evidence given by a witness either by reason of unreliability or dishonesty or lying while under oath.

[18] I am keeping in mind that discrepancies there will always be, especially when the rendition of evidence is one that involves the recollection of sudden and abrupt events. The considerations that a court must take into account when assessing the testimony of a witness is never finite.

[19] Examples include location of the incident, the distance a witness is from the impugned act, the age, the strength and frailty of a witness to name a few, must all be factored in. In cases where events occurred several years before the trial commenced, consideration must be made on the ability of witnesses to recall, as some witnesses can recall events better than others. Failure to do so should not automatically render the witness unreliable.

[20] It is trite that discrepancies in a witness testimony do not right away make him an unreliable witness and make the whole of his evidence unacceptable (see *Mohamed Alias v. PP* [1981] 1 LNS 200; [1983] 2 MLJ 172; *Chean Siong Guat v. PP* [1969] 1 LNS 23; [1969] 2 MLJ 63; *PP v. Datuk Hj Harun Hji Idris (No 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15).

[21] The object of impeachment proceedings is to discredit such evidence. If it succeeds, the evidence must be disregarded altogether although there are judicial pronouncements to the effect that the trial court is entitled to pick and choose whether to disbelieve some portion of the evidence and reject the others.

[22] In *PP v. Dwi Supriyatno Mei & Ors* [2013] 1 LNS 1188; [2015] AMEJ 258 the High Court ruled that:

> *The defence called its last witness, Tan Guan Cheng, SD5. In the course of giving his evidence, there were material contradictions in SD5's evidence In court and his s. 112 statement. Learned deputy had applied to impeach the credibility of SD5. As he failed to render satisfactory explanations thereto, his credit was impeached*: see *PP v. Munusamy* [1980] 2 MLJ 133; *PP v. Mohd Ali Abang & Ors* [1992] 3 CLJ (Rep) 321; [1994] 2 MLJ 12.

[23] I chose the view that if impeachment succeeds, the entire evidence of the impeached witness must be disregarded totally as if he never gave evidence. The record of his earlier testimony which has since been impeached may be used as a subject matter for perjury trial against such a witness.

[24] It must be borne in mind that an impeached evidence should not be used as affirmative evidence against the opponent (in this case the accused persons). On the same score, no adverse inference may be invoked against the party that called him in the first place (in this instance, the prosecution). Hence it cuts both ways.

[25] It is a common feature of trials that witnesses may afford evidence which are not identical. The DPP must present his case as is. He must not mould his case with evidence which fits the charge. If the testimony of a witness during trial is contrary to the findings of the investigation (in any previous statement or as a result of a statement recorded during the course of investigation) a DPP may take steps to save its case. This will include attempts to refresh the memory of a witness under s. 159 of the Act. The DPP could even embark on treating a witness hostile and apply to court to have the witness cross-examined under s. 154 of the Act. The outcome of which does not nullify the value of the witness testimony.

[26] The extreme position that can be taken is to impeach the credibility of the witness under s. 145 read with s. 154 of the Act resulting in the evidence of an impeached witness to be rendered worthless (see *Koay Chooi v. Regina* [1955] 1 LNS 41; [1955] 1 MLJ 209; *Matthew Lim v. Game Warden, Pahang* [1959] 1 LNS 57; [1960] 1 MLJ 89; *PP v. Munusamy* [1980] 1 LNS 63; [1980] 2 MLJ 133 (FC)).

[27] I chose the view that an impeached testimony is to be totally disregarded because it works in favour of the accused person on the principle that if there is a doubt, the benefit of that doubt be given to the accused.

[28] There may be some portion of the impeached witness testimony that goes against the opponent (in this case, the accused person) but as the principle goes, the entire testimony must be totally disregarded.

[29] The law on impeachment is found in both the Evidence Act and the Criminal Procedure Code. For ease of reference, I shall reproduce them.

(i) Section 155 Evidence Act 1950

155 Impeaching credit of witness

The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:

(a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;

(b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(d) (Deleted by Act A729: s. 3)

Explanation - A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives shall not be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

ILLUSTRATIONS

(a) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.

Evidence is offered to show that on a previous occasion he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that on a previous occasion C said that the wound was not given by A or in his presence.

The evidence is admissible.

(ii) Section 145 Evidence Act 1950

145 Cross-examination as to previous statements in writing

(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross- examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

(iii) Section 113 Criminal Procedure Code

113 Admission of statements in evidence

(1) Except as provided in this section, no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence.

(2) *When any witness is called for the prosecution or for the defence, other than the accused, the court shall, on the request of the accused or the prosecutor, refer to any statement made by that witness to a police officer in the course of a police investigation under this Chapter and may then, if the court thinks fit*

in the interest of justice, direct the accused to be furnished with a copy of it and the statement may be used to impeach the credit of the witness in the manner provided by the Evidence Act 1950 [Act 56].

(3) Where the accused had made a statement during the course of a police investigation, such statement may be admitted in evidence in support of his defence during the course of the trial.

(4) Nothing in this section shall be deemed to apply to any statement made in the course of an identification parade or falling within s. 27 or paragraphs 32(1)(a), (i) and (j) of the Evidence Act 1950.

(5) When any person is charged with any offence in relation to-

(a) the making; or

(b) the contents,

of any statement made by him to a police officer in the course of a police investigation made under this Chapter, that statement may be used as evidence in the prosecution's case.

[30] In *Kurup v. PP* [1933] 1 LNS 38, His Lordship Acting Chief Justice Terrell

It will be seen that if the court considers it expedient in the interests of justice "the statement may be used to impeach the credit" of the accused in the manner provided by the Evidence Ordinance: s. 155(c) of that Ordinance provides that the credit of a witness, – in this case the accused - may be impeached "by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

[31] If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he made such statement.

[32] Section 155 Evidence Act sets out the manner an impeachment may be done, which are:

(i) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;

(ii) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(iii) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

[33] For (i), another witness is called to testify on the credibility of the impugned witness that a party sought to impeach. This evidence must be of sufficient strength that it demolishes the value of the impugned witness. The impugned witness's evidence could not withstand the test of fine comb scrutiny either because it is inherently incredible based on facts and circumstances of the case, or has been embellished so much that it is impossible to distinguish the chaff from the grain or contrary to documentary evidence in its plain language.

[34] However, if the difference is on the different perception of things or different interpretation which are both plausible and reasonable, then impeachment should not be allowed.

[35] The witness called which is relied on to impeach the impugned witness must:

(i) Offer credible evidence.

(ii) Is himself is a trustworthy witness worthy of consideration.

(iii) Has in support of his testimony, some form of corroborative evidence that the law accepts and may be relied upon by the court.

[36] For this purpose, the court obtains supporting evidence from any provision of any law for the time being in force.

[37] His Lordship Justice Ali in *Mohamed Kasdi v. PP* [1968] 1 LNS 78; [1969] 1 MLJ 135 said this:

> *No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness.*

[38] For (ii), the conditions required by law are either:

(a) By proof that the witness has been bribed, or

(b) The witness has accepted the offer of a bribe, or

(c) The witness has received any other corrupt inducement to give his evidence.

[39] The bribe may be in cash or in kind. Notwithstanding, the evidence given seemed plausible or reasonable, the strong suspicion that such evidence given is tampered with an ulterior motive that it should not be acted upon.

[40] Not only is the credibility of such a witness is in doubt but the stench of corruption stinks heaven's high. *Prima facie* proof of corruption in any form is sufficient to fall under limb (ii).

[41] Section 155(c) must however be read together with s. 145(1) of the Evidence Act which reads as follows.

[42] Section 145(1) sets out the procedure for impeachment. His Lordship Justice Taylor in *Muthusamy v. PP* [1947] 1 LNS 71; [1948] 1 MLJ 57 laid down in great detail the procedure for impeachment proceeding, with which we agree. They are as follows:

> The proper way to apply the sections is this. On the request of either side, the court reads the former statement. If there is no serious discrepancy the court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable.
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> *Differences may be divided into four classes:*
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> *(a) Minor differences, not amounting to discrepancies;*
>
> *(b) Apparent discrepancies;*
>
> *(c) Serious discrepancies;*
>
> *(d) Material contradictions.*
>
> *Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expressions used in either, and all the less so where he does not speak English.*
>
> *If the police statement gives an outline of substantially the same story there being no apparently irreconcilable conflict between the two on any point material to the issue, the Magistrate should say at once:*
>
> *'The difference is not such as to affect his credit' and hand the statement back.*
>
> *If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement.*
>
> *If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubt as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.*

[43] Differences may be divided into four classes:

(i) minor differences, not amounting to discrepancies;

(ii) apparent discrepancies;

(iii) serious discrepancies;

(iv) material contradictions.

[44] If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference.

[45] If he can, then his credit is saved, though there may still be doubt as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.

[46] In *Kurup v. PP* (*supra*), it was explained that:

> The last part of s. 113(ii) "and such statement ... ordinance" allows the use of the statement in the second way, that is to impeach the credit of the witness who made it in manner provided by the Evidence Ordinance. That manner is laid down at s. 155, cl (c) of the Evidence Ordinance as follows:
>
> > The credit of a witness may be impeached in the following ways by the adverse Party or, with the consent of the court, by the party who calls him:
> >
> > (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.
>
> *To impeach the witness's credit, therefore, his inconsistent statement must be proved. As the statement now in question was required by s. 112 to be reduced to writing, the writing is the only evidence admissible to prove this statement; but the writing by itself cannot prove that the accused was the person who made this statement therein contained. That fact must proved by the evidence of the officer who examined the accused and reduced the statement to writing, or by the interpreter, or by some other means. In this trial the writing was admitted in evidence and marked without proof that it was the accused who made the statement contained in the writing though the prosecutor had the witnesses necessary to prove that fact in attendance. Section 80 Evidence Ordinance contains no presumption which will rectify that omission.*

[47] It is clear that there must be some material and real contradictions or circumstances unexplained by the witness before one can seek to impeach his credit.

[48] A hunch cannot be a basis for impeachment. The Federal Court in *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; had occasion to state:

> *A 'hunch' is a presentiment, a mental impression or feeling, a vague expectation or foreboding, and we would like to make it abundantly clear that the 'hunch' referred to in Husdi (ante) certainly could not have been intended to operate without some*

A *secure basis or foundation in order to activate the provisions of ss. 145 and 155(c) of the Evidence Act, and for this purpose sheer innate intuition of Counsel will not suffice. A mere hunch per se for this purpose is nihil ad rem; it must be secured on a substratum of some basis or foundation. There must as a sine qua non be some material contradiction or other circumstances unexplained by the witness in the first instance before Counsel can move to seek to impeach his credit.*

B

[49] A mere hunch *per se* for this purpose is *nihil ad rem*; it must be secured on a substratum of some basis or foundation. There must as a *sine qua* non be some material contradiction or other circumstances unexplained by the witness in the first instance before counsel can move to seek to impeach his credit.

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[50] In the process of impeaching a witness, the following steps as prescribed by the cases of *Krishnan Marimuthu & Anor v. PP* [1982] CLJ 186; [1982] CLJ (Rep) 152; [1948] 1 MLJ 57, must be adhered to:

(i) the passages in the former statement should first be marked to highlight
D the inconsistencies, if at all;

(ii) the court should then read the former statement to determine the discrepancy, if any. Minor discrepancies should be ignored;

(iii) the two conflicting versions must be compared and explained to the
E witness, for the witness to justify the differences. It is the witness' right to explain the contradiction;

(iv) if the court accepts his explanation, his credit is intact. If the court does not accept the explanation of the witness, it nevertheless, should not result in an immediate order of impeachment, but should be viewed as
F a whole with the rest of the evidence at the appropriate stage.

[51] Reading these provisions of ss. 145 and 155, there is no requirement for a former statement of a witness to be voluntarily made for the purpose of an impeachment proceedings. The provisions of these sections are plain and unambiguous and should be given their natural and ordinary meaning.
G (see *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; [1980] 2 MLJ 273). The language of these provisions also should not be outstretched beyond its common usage. (see *Cheong Seok Leng v. PP* [1988] 1 LNS 39; [1988] 2 MLJ 481).

H **[52]** In comparison with a confession under s. 24 of the Evidence Act 1950, it is a statutory requirement that a confession by an accused should not be obtained by any inducement, threat or promise for its admission as evidence. Likewise, a statement of an accused person is inadmissible if obtained by inducement, threat or promise under s. 53(2) of the Malaysian Anti-Corruption Commission Act 2009. Clearly, there is a difference between a
I statement by a witness and a statement by an accused person where voluntariness is an element for an admission for an accused's statement only.

[53] The Court of Appeal in the case of *Yusof Omar lwn. PP* [2001] 3 CLJ 122; [2001] 2 MLJ 209 has decided that there is no necessity to prove the former statement was made voluntarily for purposes of impeachment proceedings.

[54] Clearly, voluntariness is not an issue for a statement made under s. 112 of the Criminal Procedure Code as in the present case although with the amendment of s. 113 of the same Code.

[55] Likewise in the case of *Sim Bok Huat Royston v. PP* [2001] 2 SLR 348 where Chief Justice Yong Pung How CJ said this:

> *It was not disputed that Tan was the prosecution's sole material witness in this case, one who also turned hostile during his examination-in chief. As a result, the prosecution sought to impeach his credit by highlighting the material discrepancies between his testimony in court, and his prior statements to the CPIB. When oppressive acts by SSI Liew were alleged by Tan in the recording of P4, the district judge allowed the prosecution's application to conduct a voir dire in order to determine the voluntariness of Tan's statements. With respect, I found that the course taken by the trial judge was procedurally erroneous. Nowhere is it stated either in the Criminal Procedure Code (Cap 68) ('The CPC') or the Evidence Act that a witness, as opposed to an accused's, statement to the police or CPIB officer is subject to any test of voluntariness. In other words, there is nothing in the statute law which states that a witness, police or other statement has to be voluntary before it may be admitted as evidence in a trial. It will be seen that the voluntariness test espoused in s. 122(5) of the CPC for the police statements and s. 24 of the Evidence Act for confessions made to non police officers, apply only to statements given by an accused person.*

[56] The case of [2008] 1 LNS 923; [2008] MLJU 667 explained the same issue in the following manner:

> *as a second string to his bow, learned counsel argued that the learned judge ought not to have rejected the evidence of DW2 and DW3 in toto by assigning no weight at all to it. According to the learned counsel, the judge should have treated their evidence with caution and proceeded upon an evaluation on that basis ... Here the learned judge in assigning no weight to the evidence of DW2 and DW3 relied on Mathewlim v. Games Warden, Pahang [1960] MLJ 89, where Adam J held that where a witness' credit has been impeached, his evidence becomes worthless. We may add that a similar approach was adopted by Abdoolcader J in PP v. Datuk Hajiharun Bin Haji Idris [1987] 1 MLJ 180. We are therefore unable to agree with the submission of learned counsel for the appellant that the learned judge had misdirected himself on this part of the case.*

[57] His Lordship Justice Salleh Abas (later Lord President) speaking for the Federal Court in *Krishnan Marimuthu & Anor v. PP* [1982] CLJ 186; [1982] CLJ (Rep) 152, 157 explained the correct way to impeach the credit of a witness in these erudite terms:

> *One of the methods to impeach the credit of a witness is by proof of his former statement inconsistent with the evidence which is liable to be contradicted. This is enacted by s. 155(c) of the Evidence Act, according to which impeachment essentially consists of two elements:*

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(a) contradicting the witness' evidence; ie, confronting him with the inconsistent statement; and

(b) proof of the statement.

As regards contradicting, the second limb of s. 145(1) of the Act requires the party who conducts the impeachment to draw the witness' attention to the inconsistent part of his statement, before confronting him with it. This rule is similar to the provision of s. 5 of the Criminal Procedure Act 1865 of the United Kingdom; its intention being to give the witness an opportunity of either explaining away the inconsistent part of the statement or correcting his evidence so as to remove the inconsistency. If as a result of his explanation or correction, there is no more inconsistency, the matter ends there, otherwise the witness is liable to be contradicted. Thus as a first step it is essential that the court should be given the discretion to determine a preliminary question whether the witness' former statement is inconsistent with his evidence, otherwise much time will be wasted if it is found later that his former statement is not really irreconcilable with his evidence. We therefore think that it is a good procedure that a Judge should be shown the statement as a first step in the impeachment procedure.

Regarding proof of the former statement, this could be given by putting into the witness box the person, to whom the relevant statement was made or by whom it was recorded. The proof should show that the witness did make the relevant statement. In the case of an oral statement, evidence must be given what that statement was, but where the previous statement was written or reduced into writing, the writing itself should be produced. If the original writing is not available, with further proof as to its non-availability, a copy of the writing could be admitted. This is what happened in Lim Ba Ba's case, where a carbon copy was admitted and the court held that this was perfectly in accordance with the law. In the case of a cautioned statement, the police officer recording it, in addition to giving evidence that he recorded the statement under caution has to go further and show that it was voluntarily made. Thus the procedure laid down in Munusamy's case as applied to a cautioned statement only adds one more rule in that it requires the prosecution to show that the statement was voluntarily made. It must be remembered here that, lest we may be misunderstood, the proof of the inconsistent statement, whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement. In other words the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.

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[58] On the above authority, impeachment essentially consists of two elements:

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(i) contradicting the witness' evidence; ie, confronting him with the inconsistent statement; and

(ii) proof of the statement.

[59] As regards contradicting, the second limb of s. 145(1) of the Act requires the party who conducts the impeachment to draw the witness' attention to the inconsistent part of his statement, before confronting him with it.

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[60] Its intention being to give the witness an opportunity of either explaining away the inconsistent part of the statement or correcting his evidence so as to remove the inconsistency.

[61] If as a result of his explanation or correction, there is no more inconsistency, the matter ends there, otherwise the witness is liable to be contradicted.

[62] Thus, as a first step, it is essential that the court should be given the discretion to determine a preliminary question whether the witness' former statement is inconsistent with his evidence, otherwise much time will be wasted if it is found later that his former statement is not really irreconcilable with his evidence.

[63] It is a good procedure that a judge should be shown the statement as a first step in the impeachment procedure.

[64] Regarding proof of the former statement, this could be given by putting into the witness box the person, to whom the relevant statement was made or by whom it was recorded. The proof should show that the witness did make the relevant statement.

[65] In the case of an oral statement, evidence must be given what that statement was, but where the previous statement was written or reduced into writing, the writing itself should be produced.

[66] If the original writing is not available, with further proof as to its non-availability, a copy of the writing could be admitted. This is what happened in *Lim Ba Ba*'s case, where a carbon copy was admitted and the court held that this was perfectly in accordance with the law.

[67] In the case of a cautioned statement, the police officer recording it, in addition to giving evidence that he recorded the statement under caution has to go further and show that it was voluntarily made. Thus the procedure laid down in *Munusamy*'s case as applied to a cautioned statement only adds one more rule in that it requires the prosecution to show that the statement was voluntarily made.

[68] It must be remembered here that, lest we may be misunderstood, the proof of the inconsistent statement, whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement.

[69] In other words, the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.

[70] The Supreme Court of India in *Kehar Singh & Ors v. The State (Delhi Administration)* [1989] 1 CLJ 318; [1989] 2 CLJ (Rep) 723 said this:

> *This section provides that the credit of a witness may be impeached in the following ways by an adverse party with the consent of the court by the party who calls him and the third sub-clause refers to a former statement which is inconsistent with the statement made by the witness in evidence in the case and it is permissible that the witness be contradicted about that statement. The third provision is s. 157 which provides for the use of a previous statement for corroboration. It reads:*
>
> > *157. Former statements of witness may be proved to corroborate later testimony as to same fact. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved.*
>
> *A perusal of these three sections clearly indicate that there are two purposes for which a previous statement can be used. One is for cross-examination and contradiction and the other is for corroboration. The first purpose is to discredit the witness by putting to him the earlier statement and contradicting him on that basis. So far as corroboration is concerned it could not be disputed that it is none of the purposes of the defence to corroborate the evidence on the basis of the previous statement. Section 145 therefore is the main section under which relief was sought by the accused. The use for which the previous statement was asked for was to contradict him if necessary and if it was a contradiction then the earlier statement was necessary so that contradiction be put to the witness and that part of the statement can be proved.*
>
> *To my mind, there could be no other purpose for which the appellants could use the previous statements of those witnesses. Contradiction could be used either to impeach his credit or discredit him or to pull down or bring down the reliability of the witness. These purposes for which the previous statements are required could not be said to be purposes which were not against the witnesses. The two aspects of the restrictions which s. 6 contemplates and have been discussed earlier are the only two aspects which could be the result of the use of these statements. I cannot find any other use of such previous statements in criminal proceedings. It is therefore clear that without going into the wider questions even a plain reading of s. 6 as discussed above will prohibit the use of the previous statements at the trial either for the purposes of cross-examination to contradict the witness or to impeach his credit. The only permissible use which has been provided under s. 6 is which has been discussed earlier and therefore the courts below were right in not granting the relief to the accused.*

[71] In *PP v. Lai Kon Ching & Anor* [1994] 4 CLJ 750 it was held:

> *It was argued that the three documents requested for would enable the defence to impeach the credit of Busra under s. 145(1) of the Evidence Act 1950. It was contended that the defence was entitled to those three documents.*
>
> *Section 145(1) of the Evidence Act 1950 reads thus:*
>
> > *A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown*

to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Towards this end, s. 155(c) of the Evidence Act 1950 is also relevant. That section reads as follows:

The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

These sections would certainly allow great latitude to the defence to seek out those documents and impeach the credit of Busra. In relation to a police statement sought by the defence in order to impeach the credit of a prosecution witness (this is not the case here), His Lordship Suffian LP (as he then was) in Husdi v. PP [1979] 1 LNS 33 had this to say:

... when a prosecution witness is being cross-examined, and the defence proposes to impeach his credit, the court, should, on the request of the defence, refer to his police statement and may then, if the court thinks it expedient in the interest of justice, direct the defence to be supplied with a copy.

Evaluation Of The Testimony Of PW21

[72] I shall not repeat the testimony and explanation of PW21 which I have reproduced extensively earlier.

[73] I found that the testimony contains more than one occasion of serious discrepancies and material contradictions either on identity, conduct, names, the presence of various names. Further, PW21 said that he mentioned names because he heard the names. This is called the rule against hearsay contrary to s. 60 Evidence Act 1950.

[74] I found that his testimony is obviously tainted and it is so unsafe to act on them because it has no substance in evidence law.

[75] I found that his testimony is so tainted with material contradictions and I found that PW21 lied on more than one occasion and totally unreliable.

Conclusion

[76] For the reasons aforesaid, I ruled that the prosecution has successfully impeached the credibility of the evidence of PW21 and his testimony shall be expunged from the records and shall not be considered at all for the purpose of this trial.